

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 575158 and 257629
Issued to: Robert J. TOMBARI

DECISION OF THE VICE COMMANDANT REGARDING APPELLANT'S EQUAL
ACCESS
TO JUSTICE ACT CLAIM
UNITED STATES COAST GUARD

2483

Robert J. TOMBARI

This application for an award of fees and expenses under the Equal Access to Justice Act has been received and reviewed in accordance with 5 U.S.C. §504 and 49 CFR Part 6.

On 29 January 1988, Appellant requested that the Commandant issue a temporary license as a Chief Engineer with prior endorsements pending appeal of the Decision & Order of the Administrative Law Judge in the suspension and revocation proceeding. On 12 July 1988, the Vice Commandant denied Appellant's request for a temporary license. See Appeal Decision 2467 (TOMBARI).

By order dated 30 November 1988, the National Transportation Safety Board reversed the decision of the Vice-Commandant denying the issuance of a temporary license to the Appellant. See Commandant v. Tombari, NTSB Order No. EM-150 (1988). On 22 February 1989, Appellant applied for attorney's fees and other expenses under the Equal Access to Justice Act (5 U.S.C. §504) incurred in connection with his appeal from the decision of the Vice Commandant denying Appellant's application for a temporary license. By letter dated 3 March 1989, Appellant was notified by the Office of Chief Counsel of the Coast Guard that it appeared 5 U.S.C. §504 and the relevant regulation in 49 CFR §6.5 excluded proceedings to grant or renew licenses from coverage under the Equal Access to Justice Act. Appellant was given the opportunity to respond to this position. Appellant submitted his letter of 10 March 1989 in response.

BASIS OF APPLICATION

Appellant has submitted his application for attorney fees and other expenses in accordance with 49 CFR Part 6, Subpart B. In Appellant's Exhibit G, attached to his application, Appellant sets forth the documentation of fees and expenses. Appellant states in Exhibit G that his application is "being made only in connection with services performed and expenses incurred in connection with matters occurring after [Appellant] filed his request for a

temporary license." My scope of review under EAJA is limited to Appellant's application regarding the request that a temporary license be granted pending appeal.

In this regard, Appellant is seeking fees and expenses totalling \$3,078.68, as set forth in Exhibit G. with regard to attorney fees, Appellant was billed at an hourly rate of \$135.00 for 21.3 hours totalling \$2875.50, according to documentation in Exhibit G.

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OPINION

Before Appellant's application can be considered on the merits, a threshold determination must be made as to whether the application falls within the category of claims for which payment can be made under 5 U.S.C. §504 and 49 CFR Part 6. Only those proceedings specifically set forth in the statute and regulations can form the basis for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA). See Smedberg Machine & Tool, Inc. v. Donovan, 730 F. 2d 1089 (7th Cir. 1984) (EAJA must be strictly construed in favor of United States.)

5 U.S.C. §504

The relevant statute authorizing an award of fees and other expenses from agency proceedings is 5 U.S.C. §504 (EAJA). In 5 U.S.C. §504(a)(1), the Act states:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

The statute defines the categories of "adversary adjudications" covered by the Act in 5 U.S.C. §504(b)(1)(c), which, in relevant part, states:

"adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing

or fixing a rate or for the purpose of granting or renewing a license,....(Emphasis added.)

Congress clearly intended to exclude proceedings held for the purpose of granting a license. The legislative history bears out the intention to exclude applications for licenses from coverage under EAJA. See H.R. Rep. No. 1418, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 4994, 5012.

49 CFR Part 6

Coast Guard proceedings are governed by Department of Transportation regulations pertaining to EAJA claims. The relevant DOT regulations are found in 49 CFR Part 6. In 49 CFR §6.5(a), the Department of Transportation delineates which proceedings are to be considered and which are to be excluded from consideration under EAJA. 49 CFR §6.5(a) states in relevant part:

Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For the Department of Transportation, the type of proceedings generally covered include: Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 239; 46 CFR Part 5. (Emphasis added.)

THE NATURE OF A TEMPORARY LICENSE

The Coast Guard issues licenses to merchant mariners to serve as masters, pilots, mates, deck officers, engineers, and radio officers (46 CFR Part 10).¹ Similarly, the Coast Guard also licenses operator of uninspected towing vessels (46 CFR §10.16), and motorboat operators (46 CFR §10.20).

All Coast Guard merchant mariner's licenses are subject to suspension and revocation proceedings following incidents involving negligence, incompetence, misconduct, or illegal drugs. Suspension and revocation proceedings are held pursuant to 46 U.S.C. §7701, et seq., and the relevant sections of 46 CFR Part 5. Following a proceeding wherein a license has been suspended or revoked, the respondent in that proceeding may appeal the Decision & Order of the Administrative Law Judge to the Commandant of the Coast Guard.

¹The analysis in this matters is limited to merchant mariner's licenses. The Coast Guard also issues documents to merchant seaman authorizing service in various capacities pursuant to 46 U.S.C. Chapter 73 and certificates of registry pursuant to 46 U.S.C. Chapter 71.

If the respondent has appealed the Decision & Order, he may also separately elect to make a written request for a temporary license.² This is a distinct, independent proceeding from the suspension and revocation proceeding. See 46 CFR §5.707(a). The Coast Guard official taking action on the respondent's request for a temporary license must "take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws." See 46 CFR §5.707(c). An appellant may also request a temporary license following the appeal of a Commandant's Decision on Appeal to the National Transportation Safety Board. See 46 CFR §5.715.

The temporary license authorizes the respondent to serve in the capacity authorized by the responsible Coast Guard official that took action on the request. Depending on the circumstances, an appellant, for safety reasons, may only be permitted to serve in a lesser capacity than his regular license would otherwise authorize. The temporary license is distinct from the regular license. The temporary license is valid for a period of six months and may be renewed. It expires upon the issuance of the Commandant's Decision on Appeal. See 46 CFR §5.707(d).

EXCLUSION FOR THE GRANTING OF A LICENSE

As discussed, both 5 U.S.C. §504(b)(1)(c) and 49 CFR §6.5.(a) specifically exclude proceedings for the purpose of granting a license from coverage under EAJA. See Bullwinkel v. United States Department of Transportation, FAA, and NTSB, 787 F.2d 254 (7th Cir. 1986). The term "license" is defined by the Administrative Procedure Act, 5 U.S.C. §551(8), which states:

"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

EAJA incorporates this definition, by reference, in 5 U.C.S. §504(b)(2). The temporary license, as discussed above, is a license within the definition of 5 U.S.C. §551(8). Cf. Bullwinkel, supra.

The distinction between a suspension and revocation proceeding and a proceeding to grant a temporary license, as discussed above, is further clarified in the Supplementary Information section accompanying the publication of 49 CFR Part 6 in the Federal Register. This section states:

²A temporary license is not available following a revocation resulting from an offense enumerated in 46 CFR §5.59.

[EAJA] provides for the award of attorney fees and other expenses to eligible individuals and entities that are parties to certain administrative proceedings (proceedings conducted under section 554 of the APA before government agencies) and prevail over the government.

In the Department of Transportation, at this time, three operating administrations are statutorily required to conduct certain proceedings to which [5 U.S.C.] §554 of the APA applies. The Coast Guard conducts hearings in all cases involving acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service (46 U.S.C. 239; 46 CFR Part 5). These hearings are conducted in order to investigate the alleged acts of misconduct or incompetency and to determine if a license or certificate holder should have the license or certificate revoked. Final Rule, 48 Fed. Reg. 1068,1069 (Jan. 10,1983).

Thus, the Department clarified the meaning of suspension and revocation proceeding. for purposes of an award under EAJA, this proceeding is limited to the hearing to suspend or revoke a merchant mariner's license.

APPELLANT'S RESPONSE OF 10 MARCH 1989

In his response of 10 March 1989, Appellant argues that Bullwinkel v. United States Department of Transportation, FAA, and NTSB, 787 F.2d 254 (7th Cir. 1986) is not on point at all. I disagree. appellant distinguishes the Bullwinkel case on two grounds. First, he argues that Bullwinkel dealt with the denial of a new airman medical certificate, rather than the denial of a temporary Coast Guard license. Appellant argues he was not applying for a new license or renewing an existing license, but rather he was seeking a stay of the Decision & Order of the Administrative Law Judge, which would include the issuance of a temporary license. Secondly, Appellant argues that the grant of a temporary license, unlike Bullwinkel, is a proceeding to modify, suspend, or revoke a license and as such, is listed in 49 CFR §6.5(a) as among "the types of proceedings generally covered".

As to Appellant's first argument, regardless of whether this was a proceeding to grant a license or rather a proceeding to suspend or revoke a license, there must first be a determination that a proceeding involves a license within the context of 5 U.S.C §504(b)(1)(c). In this regard, the court in Bullwinkel looked to the definition of "license" in 5 U.S.C. §551(8) to determine if the airman medical certificate was a license for purpose of EAJA. This

same analysis is applicable in Appellant's case. Following the suspension or revocation of a license, an appellant must surrender his license to the Coast Guard. Thereafter, a appellant may work on board vessels during the pendency of his appeal only if the appellant is given the authority, albeit temporarily, by the Coast Guard. In this regard, he must hold a temporary license issued by the Coast Guard. As discussed above, within the meaning of 5 U.S.C. §551(8), the Coast Guard grants an appellant permission to work during this period. Therefore, a temporary license is a "license" within the meaning of 5 U.S.C. §551(8) and 5 U.S.C. §504(b)(1)(C).

Appellant's second argument that Bullwinkel, supra, is not point since the grant of a temporary license, unlike Bullwinkel, is a proceeding to modify, suspend, or revoke a license is also not persuasive. Bullwinkel is relevant to Appellant's case because it dealt with the granting of a certificate required before a pilot could fly his plane. Likewise, Appellant was required to hold a temporary license before he could serve on board vessels in a licensed capacity during the pendency of his appeal. The holding in Bullwinkel states that if a document is a license within the meaning of 5 U.S.C. §551(8) then the proceeding to grant that license is excluded from an award under EAJA by both 5 U.S.C. §504(b)(1)(C) and 49 CFR §6.5(a). Therefore, Bullwinkel is relevant to my analysis of whether Appellant's application falls within the scope of EAJA.

Also, in his response letter of 10 March 1989, Appellant claims that 5 U.S.C. §504 and 49 CFR §6.5(a) include proceedings to grant a temporary license because the application for a temporary license "relates to and arises out of Coast Guard suspension and revocation proceedings brought under 46 CFR Part 5." Certainly the granting of a temporary license relates to a suspension or revocation proceeding, since Appellant was required to surrender his license following the suspension of his license. At this point, Appellant may not be employed in any position requiring a license. Appellant did request that the Coast Guard grant him a temporary license pursuant to 46 CFR §5.707. However, a suspension and revocation proceeding must not only be concluded, but also the respondent must have failed a Notice of Appeal from that proceeding, before the regulation allows him to request that a temporary license be issued. See 46 CFR § 5.707(a). The filing of a Notice of Appeal divests the Administrative Law Judge of jurisdiction over the suspension and revocation proceeding. An appellant must submit his request for a temporary license for action by the appropriate Coast Guard official in accordance with 46 CFR §5.707(b). The denial of a request for a temporary license is appealed separately from an appeal from the suspension and revocation proceeding. Compare 46 CFR §5.707(e) with 46 CFR

§5.701.

The fact that issues are related is not determinative. 49 CFR §6.5(b), which deals specifically with issues that are related to each other, states:

If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

As discussed above, only suspension and revocation proceedings (the hearings) are specifically included by name in 49 CFR §6.5. The granting of a temporary license is an independent, albeit related, proceeding that may follow a suspension and revocation proceeding. As such it is a separate proceeding apart from the suspension and revocation proceeding for purpose of analysis under EAJA.

CONCLUSION

A temporary license issued pending appeal of a Decision & Order in a suspension and revocation proceeding is a "license" within the meaning of 5 U.S.C. §551(8) and 5 U.S.C. §504(b)(1)(C). The proceeding to grant a temporary license is separate and distinct from the proceeding to suspend or revoke a license. Both the Equal Access to Justice Act and Department of Transportation regulations exclude proceedings to grant a license, from the category of proceedings for which an award for attorney fees and other expenses can be made. Appellant has limited his request for attorney fees and other expenses to the proceeding in which the Vice-Commandant denied Appellant's request that a temporary license be granted pending appeal. Therefore, Appellant's application for an award of attorney fees and other expenses must be denied as not falling within the scope of the Equal Access to Justice Act.

ORDER

Appellant's application for an award of attorney fees and other expenses relating to the denial of Appellant's request for a temporary license pending the appeal of the Administrative Law Judge's Decision and Order is hereby DENIED. This denial constitutes final agency action in this matter. This decision may be appealed pursuant to 5 U.S.C. §504(c)(2) and 49 CFR §6.37

CLYDE T. LUSK JR.
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 14th day of April 1989.